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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
and JOHN F. KEHOE, JR., COMMISSIONER of PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANTS,

v.

ROBERT D. MURGIA,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF APPELLEE TO AFFIRM

ROBERT D. CITY, Esq.
THOMAS J. BUTTERS, Esq.
MOULTON, LOONEY & MAZZONE
15 Broad Street
Boston, Massachusetts 02109
(617) 742-5550
Attorneys for the Appellee

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellee Robert D. Murgia moves

this Court to affirm the decision of the United States District Court for the District of Massachusetts on the ground that the question presented is so insubstantial as not to need further argument.

Statement of the Case

The Uniformed Branch of the Massachusetts State Police is organized under the laws of the Commonwealth of Massachusetts for the primary purpose of providing protection for persons and property and for the maintenance of law and order in the Commonwealth. At present the Uniformed Branch consists of approximately 880 members organized in a paramilitary structure. Its personnel are assigned primarily to field operations.

Men between the ages of 21 and 30 may apply for initial enlistment in the Uniformed Branch. An applicant's suitability for membership in the Uniformed Branch is determined in part by an enlistment physical examination. The enlistment physical examination is a comprehensive and thorough examination based upon the medical examination used at basic training in the Military. Failure to pass the physical examination results in the applicant being refused membership. The enlistment term is set administratively at two years.

After completing the initial two year enlistment term, a member must apply for reenlistment for each additional two year term he serves. Acceptance for each subsequent enlistment is conditioned upon successful completion of the reenlistment examination, which is identical to the enlistment physical examination. Failure to pass the examination results in denial of the reenlistment application unless a waiver is obtained.

Beginning at age 40 the member must undergo a medical examination on an annual basis. The annual examination

given to members over age 40 is identical to the enlistment and reenlistment physical examination and in addition requires an electrocardiogram and a test for intestinal bleeding. Failure to pass the annual physical examination results in mandatory disability retirement unless a waiver is obtained. When a member passes the enlistment, reenlistment and annual physical, he is administratively determined to be completely fit and qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police.

Every member of the Uniformed Branch of the Massachusetts State Police who has served a minimum of 20 years is mandatorily retired for superannuation at age 50. Those members who have not served for 20 years on their fiftieth birthday are permitted to continue in service until completion of 20 years, provided the member continues to pass the annual physical examination.

Plaintiff was born on July 23, 1922 and on April 7, 1948 became a member of the Uniformed Branch of the Massachusetts State Police, attaining the rank of Lieutenant Colonel, the highest rank in the Uniformed Branch and the second ranking officer in the Massachusetts State Police. In March, 1972 the plaintiff was given his annual physical examination and was found fully qualified to continue in his duties as a uniformed state police officer. On May 8, 1972 plaintiff received a letter from the Retirement Board of the Commonwealth of Massachusetts informing him that under the provisions of Massachusetts General Laws ch. 32, §26(3), he was subject to mandatory retirement for superannuation on his fiftieth birthday, which would occur on July 23, 1972. Thereafter on July 7, 1972 plaintiff commenced this civil action in the United States District Court for the District of Massachusetts alleging denial of his civil rights of due process and equal protection

and seeking an injunction against the operation of Mass. Gen. Laws ch. 32, §26(3) (1966).

After hearing on a motion for a temporary restraining order and a request for the convening of a three-judge court, the district judge dismissed the complaint for failure to raise a substantial constitutional question. The plaintiff was mandatorily retired from the Massachusetts State Police on July 23, 1972. The plaintiff appealed the decision of the single judge to the United States Court of Appeals for the First Circuit, which court reversed the judgment of the district court and remanded the matter to the district court for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

A three-judge court was convened and evidence was taken by way of the submission of depositions, affidavits and various documentary materials. The court reached only the issue of whether the statutory classification based on age 50 had a rational basis in furthering some substantial state interest. The court found that the plaintiff had standing to raise the issue in that he was in excellent physical health and capable of performing the duties of a state police officer whether involving physical or psychological stress. The court found that service in the Uniformed Branch is or can be arduous and that the state has a legitimate purpose in maintaining rigorous job requirements. The court placed the burden on the plaintiff to show that the statute lacked a rational basis.

The court held that the plaintiff showed he had a recognizable interest in retaining his employment which the state could not deny arbitrarily or irrationally and that he had met his burden in showing that the mandatory retirement of officers at age 50 had no fair and substantial relationship to the object of the legislation.

After a further hearing on the nature of the relief to be granted, the court entered an order enjoining the de-

fendants, the Board of Retirement and the Commissioner of Public Safety, from enforcing Mass. Gen. Laws ch. 32, § 26(3) against the plaintiff. Defendants have appealed the decision of the district court.

Argument

The three-judge district court found that Mass. Gen. Laws ch. 32, § 26(3) which required the members of the Uniformed Branch of the Massachusetts State Police to be mandatorily retired because of superannuation at age fifty violated plaintiff's constitutional rights of equal protection and due process of law and declared the statute unconstitutional and void. *Murgia* v. *Commonwealth of Massachusetts Board of Retirement*, 376 F. Supp. 753, 756 (D. Mass. 1974).

Appellants urge that a review of the holding of the district court requires plenary consideration by this Court because that holding allegedly ignored essential governmental interests and generates uncertainty in the administration of the state police and its retirement system.[1] Appellants allege that the district court's holding that plaintiff established the absence of any rational basis for the statute is in error.

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[1] Much of the alleged uncertainty in the administration of the state police and its retirement system will be rectified with the passage of House Bill 2167 which is presently pending in the Massachusetts General Court. The bill would strike that part of the statute which the district court declared unconstitutional and substitute therefor the following language:

> Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty-five or upon the expiration of such twenty years, whichever last occurs.

For text of House Bill 2167, see Appendix A.

Appellants do not dispute the district court's holding that plaintiff had standing to raise the issue. Nor do appellants challenge the propriety of the court's determination that the correct standard to be applied to test the constitutionality of the challenged state statute is that it bear a rational relation to furthering some substantial state interest. Appellants admit that the lower court correctly determined that the statute could not withstand plaintiff's challenge if it did not bear a " 'fair and substantial relation to the object of the legislation,' F. S. Royster Guano Co. v. Virginia, 1920, 253 U.S. 412, 415 quoted in Reed v. Reed, 1971, 404 U.S. 71, 76." 376 F. Supp. at 754.

The issue which Appellants take with the district court's opinion concerns only what they consider to be the court's improper application of this standard. Thus, Appellants contend:

> The district court purported to apply the rational basis test in ascertaining whether the retirement statute violated the Equal Protection Clause. Had the court actually adhered to that test, the statute would surely have survived the constitutional challenge. Jurisdictional Statement for Appellant at 5-6.

An examination of the district court's opinion shows that the test of the constitutionality of the statute was correct as applied and Appellants' contentions to the contrary are unsupportable.

The point of departure for the district court in its analysis of whether the statute bore a rational basis to a substantial state interest was the determination of the state interests involved. The district court recognized and fully respected the interests of the state in having the

Uniformed Branch provide protection for persons and property and maintain law and order. The court also recognized the fact that in order to accomplish this object the personnel must be vigorous and healthy. Unquestionably this is a legitimate state object. The district court said:

> [I]t is acknowledged that service in this branch is, or can be, arduous, and that high versatility is required, with few, if any, backwaters available for the partially superannuated. Lest there be misunderstanding, we do not fault the service in this respect; the state is entitled to maintain rigorous job requirements; nor do we understand plaintiff to contend otherwise. 376 F. Supp. at 754.

It does not appear that the Appellants challenge the correctness of this statement of the state interests. Rather, Appellants' contention appears to be that, although the district court recognized and purported to respect the legitimate governmental interests in maintaining a vigorous force; in reaching its decision that the mandatory retirement statute was unconstitutional, the court in fact must have ignored or overlooked these intrests. Appellants assert that, had the district court respected the legitimate state interest in maintaining a vigorous force it could not have found as it did; because, as they contend, mandatory retirement is inescapably related to promoting the physical capability of the state police to perform its arduous police functions. Juris. Statement for Appellant at 6.

A state may have legitimate purposes or objectives in enacting a statute and the statute can still be found defective, not because the objectives are illegitimate but

because the means to achieve the objective are not constitutionally defensible. *Vlandis* v. *Kline,* 412 U.S. 441, 452-53 (1973); *Stanley* v. *Illinois,* 405 U.S. 645, 652 (1972); *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). *See also Bell* v. *Burson,* 402 U.S. 535 (1971); *Carrington* v. *Rush,* 380 U.S. 89 (1965). It may even be that upon examination it is found that the means adopted by the statute to achieve its legitimate objectives have the effect of frustrating those very objectives. *See Vlandis* v. *Kline, supra,* at 450 (1973); *Stanley* v. *Illinois, supra,* at 654-55. That is precisely what the district court found to be the fact in this case. The mandatory retirement statute may have as its objective the promotion of the physical capability of the state police but in its operation the statute does not bear any relationship to that object and may even frustrate it.

In proceeding with its analysis, the district court discussed the restrictive judicial review to be accorded a legislative determination establishing an eligibility standard when there existed no factual basis upon which to make a precise determination. The court said the proper legislative response in many such situations is that ". . . it is administratively reasonable to select an arbitrary cutoff, and that irrationality is not established by the fact that certain individuals are disadvantaged thereby." 376 F. Supp. at 755. The district court recognized the numerous instances where legislative line drawing cannot be made with absolute precision. It said:

> We fully accept the necessity of choosing arbitrary standards in certain, and indeed in many, situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, *Oregon* v. *Mitchell,* 1970, 400 U.S. 112, even though the particular age selected may seem indifferentiable from other ages in proximity to it. *Id.* at 294 (Stewart, J., concurring in part and dissenting in part); *see id.* at 243-46 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part). *See also, e.g., United States* v. *Duncan,* 9 Cir. 1972, 456 F.2d 1401, 1405 (minimum age for jury service), *vacated on other grounds,* 409 U.S. 814; *Smith* v. *United States,* 9 Cir. 1970, 424 F.2d 267 (selective service age limitations); *Scarangella* v. *Commissioner,* 3 Cir. 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent). *Id.*

The district court noted and the plaintiff concedes that irrationality is not established by the mere fact that certain individuals, such as plaintiff, may be disadvantaged by a legislative classification. To suggest, however, as Appellants do, that the issue in this case pertains to the fact that plaintiff individually may have maintained a high level of physical capability misconceives the issue before the district court and misconstrues its holding.

The Appellants have argued that since there is admittedly a general relationship between advancing age and decreasing physical ability to do the job, and since the precise point at which the two meet will vary from case to case, the legislature should have unfettered power to arbitrarily determine the point at which the two intersect. That legislative line drawing may be necessarily arbitrary in an individual case, does not mean that the legislature has a free hand in drawing the line wherever it pleases. The line must still bear some rational relationship to the objects of the statute. *Stanley* v. *Illinois, supra,* at 652; *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U.S. 73, 75-76 (1968). As the district court put it:

> But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other. 376 F. Supp. at 755.

The operation of the statute affected not just one individual but every member of the Uniformed Branch by erecting a conclusive presumption that a member who at age 50 had 20 years of service was incapable of performing the duties of the Uniformed Branch. The court held that the retirement statute, by setting the age for mandatory retirement at so did not come within the "range where fairness, or some appreciable state interest, exists . . . ." *Id.*

Of the facts upon which the court particularly relied were those which pertained to the extensive medical testing to which each member of the Uniformed Branch of the Massachusetts State Police is subjected from the time he makes his application to join the force until he is retired. This fact of individualized medical testing provides a source of data as to the duration in time of the physical capability of the membership which cannot be ignored in the legislative establishment of the mandatory retirement age. The court said:

> In the voting and other cases above cited, the legislature was concerned with a broad spectrum of the population where it would not be practicable to make individual determinations. Under such circumstances an arbitrary standard is called for, if not inevitable,

> and the only question must be whether the one selected is, in the large, reasonable. In the case at bar the situation is exactly the reverse. Individual testing is not impracticable but, rather, is already the order of the day. *Id.*

The Appellants in their Jurisdictional Statement allege that the district court's reliance on the medical testing to demonstrate physical capability is misplaced because the testing has a singular and extremely limited purpose of assisting in the determination of whether or not a member should be retired for disability. Thus the Appellants say "[t]he medical examinations are designed to determine whether a state police officer has a physical defect which would warrant his retirement for disability. This determination relates to the maintenance of a minimal level of capability . . . ." Juris. Statement for Appellant at 7.

The facts to which Appellants stipulated and agreed at trial and to which its witnesses testified differ sharply from the restricted definition suggested in the Jurisdictional Statement. These medical examinations are, in the words of the Surgeon General and chief medical officer of the state police, the "same as those for an individual who is to undergo basic training at a military installation . . . most of those pages [in the state police manual of medical fitness standards] are taken directly out of an Army regulation . . . ." Deposition of Colonel Paul John Murphy at 15.

The purpose of the medical testing is not solely limited to a determination as to retirement for disability since the same examination is used to determine initial eligibility for men joining the Uniformed Branch. The same examination is also used to determine members' fitness

for reenlistment. Failure to meet the standards of the enlistment, reenlistment and annual examination in any respect disqualifies a member for service, unless the member obtains a waiver from the Commissioner of Public Safety. Successful completion of the medical examination, whether it is the enlistment, reenlistment or annual examination is a determination by the state that the member ". . . is found to be qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police." Plaintiff's Statement of Facts, No. 55; Defendants Admission No. 55.

The district court found that the net effect of this comprehensive medical testing program is to carefully screen and rescreen the membership to eliminate individuals who lack the requisite physical capability to perform the duties of the state police. Unfit persons are denied enlistment and reenlistment or are retired for disability. The medical testing program causes the Uniformed Branch to retain only those members who are found fit to perform all of the duties of the Massachusetts State Police. The result is that, by the time a member reaches his 49th year he has been annually examined for the preceding decade and administratively determined to be physically fit to perform all of the duties of the Uniformed Branch. Then, on his fiftieth birthday although fully fit under the state's comprehensive determination, he is forced to retire because of the operation of a statutory irrebuttable presumption that he is unfit to perform his duties.

The undisputed facts thus forced the conclusion that the mandatory retirement age not only had no rational relation to the statutory purpose of insuring the physical capability of the force but also had the counterproductive effect of forcing the retirement of members who had been determined by the state under its own definition to be fit and fully qualified.

The court correctly determined that the operation of the mandatory retirement provision in the Massachusetts statute is similar to the operation of the mandatory leave provisions struck down by this Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). In that case mandatory fifth and sixth month leave dates were attempted to be justified, among other reasons, on the ground that they kept physically unfit teachers out of the school room. This Court acknowledged the legitimacy of the objective but found the rule swept too broadly because of its conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing.[2] The Court found the rules defective because:

> [they] contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

However, in determining that no rational relationship existed between the mandatory retirement age and the statutory purpose of maintaining a vigorous force, the three-judge court did not rest its analysis entirely on this point. The court suggested a rational basis might lie in

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[2] Although the subject matter before the Court in *LaFleur* pertained to the fundamental constitutional right of procreation, the Court has indicated its disfavor with conclusive presumptions in cases which did not involve fundamental rights. *See Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Carrington* v. *Rush*, 380 U.S. 89 (1965). *See United States Dept. of Agriculture* v. *Murray*, 413 U.S. 503, 514-17 (1973) (concurring opinion); *Heiner* v. *Donnon*, 285 U.S. 312 (1932); *Hoeper* v. *Tax Comm'n*, 284 U.S. 206 (1931); *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926). If anything the statute here is on even less firm ground because there already exists individualized testing and the results show that each member mandatorily retired had been found to be fit within 12 months or less of his forced retirement.

the possibility that beginning at age 50 the aging process becomes more unpredictable so that the prognostic value of the medical testing is reduced and no longer provides an accurate indicator of the member's fitness for continued service. *See Airlines Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961). If this were the case, the court reasoned, then the state would be justified in disregarding the test data it had before it and might be justified in adhering to its arbitrary determination of age 50 for mandatory retirement.[3] The evidence showed that there was no significant change in the reliability of medical testing beginning at age 50 and the court found that "no such determination has been or could be made in the case at bar." 376 F. Supp. at 755-56.

In reaching its determination that no "critical area" was reached, the court relied upon the testimony of the experts from both sides and the statistics furnished by the Appellants. The experts had testified that there was no significant change in the reliability of medical testing at age fifty in a group which had individually passed annual tests during the preceding decade. The statistics reflecting the state experience, which plaintiff put in evidence, furnished "no reason to suppose that age 50 is within, or even significantly approaching, a range where

[3] The Appellants have suggested that the court improperly relieved the plaintiff of its burden of proof and shifted the burden to defendants to show that a critical area had been reached in that testing was not validly predictive of continued fitness. The Appellants state "if the issue is whether a critical area is reached at age fifty, the plaintiff must prove that such an area is not reached." Juris. Statement for Appellant at 8. The plaintiff in fact did show this. The Court made certain that the burden of proof remained on the plaintiff throughout. At the outset of the opinion the court said "the burden is on the plaintiff to show a lack of rational basis" and at the end of the opinion the court concluded that the "plaintiff has established the absence of any factual basis" for the statute. 376 F. Supp. at 754, 756.

changes of conditions warrant a change of treatment. Rather, they contradict it." *Id.* at 756. In addition the court found that the national experience as shown in the retirement statutes for other state police forces supported plaintiff's position.[4]

Appellants suggest that there exist state interests independent of the objectives of maintaining the physical capacity of the force which must be protected. These are the state interests in promoting morale and incentive in the service. Juris. Statement for Appellant at 9. Although these interests fall outside the stated legislative purpose of the statute, the district court nevertheless considered them.

The Appellants suggested that the age 50 mandatory retirement has the effect of providing a shorter average term of service than would be the case if a later age were selected. It follows, they argue, that the shorter the term of service the more promotions become available and morale is therefore enhanced. *Id.* The district court said that it would concede the validity of the morale argument if officers not capable of carrying their full load

[4] The Appellants' own experience with members serving on full duty status in the Uniformed Branch after age 50 contradicts their assertion that such men are not fit. Under an exception to the mandatory retirement statute, men who have not served a minimum of 20 years in the Uniformed Branch upon reaching their fiftieth birthday are permitted to continue to serve until they have 20 years of service, provided they continue to pass the annual physical examination. Although the occurrence is rare because most men have at least 20 years of service by the time they reach age fifty, a number of members have continued to serve in full capacity in the Uniformed Branch well into their fifties. The court also had before it evidence as to the airline pilot retirement age of 60. *See* 29 C.F.R. § 860.102(d) (1973); Armed Service mandatory retirement for commissioned officers begins at age 60, 10 U.S.C. § 3883 *et seq.*; members of the Federal Bureau of Investigation must retire at age 55 or upon completion of 20 years of service if then over that age. 5 U.S.C. § 8335(g) (Supp. 1975); retirement ages for members of the police departments of the cities and towns of the Commonwealth of Massachusetts, age 65, Mass. Gen. Laws ch. 32, § 83A(d) (1966).

were to be retained but since that would not occur it did not accept this argument. The court said of the Appellants' contention:

> Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness. The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position. 376 F. Supp. at 754-55.

Appellants argue that the district court did not properly consider the state's legitimate interest in preventing the stagnation of promotion of younger officers discussed by this Court in *Schlesinger* v. *Ballard,* 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975). The district court noted that under Massachusetts law a state police officer is never required to seek promotion or to accept promotion. 376 F. Supp. at 755 n.6. An officer may remain in his rank and grade for his entire career regardless of the fact that the promotion of other members in the pyramidal organizational structure thus may be retarded. Therefore the mandatory retirement statute which is the subject of this case is entirely different from one which was based upon the

"basic up or out philosophy" of the statute which was under review in *Schlesinger* v. *Ballard, supra.*[5]

Finally, the Appellants argue that the opinion of the district court below not only lacked case support but indeed disregarded substantial case law to the contrary. Juris. Statement for Appellant at 10.

Appellee submits that none of the cases cited by the Appellants detract from the correctness of the holding of the district court. That holding rests upon the proper analysis of the legislative line drawing function as a variable depending upon the persons to be included and the amount of data which the legislature has before it or could have before it. The court's review of the legislative line drawing function in cases like this one is restricted to a determination of whether the line falls within the range of fairness or rational relation to a state purpose. In circumstances where a broad spectrum of the population is involved and where individual determinations are impractical; or where such determinations if they were to be made would be inconclusive, then the legislature must necessarily be arbitrary. Under such circumstances no specific point within the range is preferable to any other and the court cannot and will not substitute its judgment for that of the legislature. Examples cited by Appellants of such legislative line drawing and limited judicial review are the setting of minimum voting ages, *Oregon* v. *Mitchell,* 400 U.S. 112 (1970); minimum ages for jury service, *United States* v. *Duncan,* 456 F.2d 1401 (9th Cir. 1972); ages for selective service, *Smith* v. *United States,* 424 F.2d 267 (9th Cir. 1970); ages of de-

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[5] It should be noted that the first legislative response to the district court's decision was to enact into law S 1798 in July, 1974, amending Mass. Gen. Laws ch. 22, § 9(P). This statute creating the new rank of deputy superintendent and creating a second lieutenant colonel position, thus meets to a large extent whatever alleged stagnation may have been created by the decision.

pendents for tax exemptions, *Scarangella* v. *Commissioner*, 418 F.2d 228 (3rd Cir. 1969).

A similar circumstance arises when maximum ages for purposes of retirement must be set. Like determinations as to the age of reaching majority, there exists a range within which a determination as to mandatory retirement is proper even though there may be little differentiation from the ages within the range. For retirement this range begins at age 60 or perhaps even age 55. Thus mandatory retirement at age 70, *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd* 43 U.S.L.W. 3461 (U.S. Feb. 25, 1975); age 65, *Armstrong* v. *Howell*, 371 F. Supp. 48 (D. Neb. 1974); *Retail Clerks Union Local 77* v. *Retail Clerks Int'l. Assn.*, 359 F. Supp. 1285 (C.D. Cal. 1973); *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y.), *aff'd*, 461 F.2d 846 (2d Cir. 1972) *cert. denied*, 409 U.S. 1129 (1973) (maximum age 65 for employment) and age 60, *Airline Pilots* v. *Quesada*, *supra*; *McIlvaine* v. *Pennsylvania*, 309 A.2d 801 (Pa. 1973), *aff'd*, 415 U.S. 986 (1974), fall within the accepted range.

The issues presented by the case at bar are different from the issues in those cases because, unlike those cases, the mandatory retirement age set by the statute in question does not fall within the range where fairness or a rational relation to a state purpose exists. The three-judge court correctly concluded that the cases cited by Appellant do not apply. The court was not dealing with a necessarily arbitrary legislative determination at the extremes of the age spectrum. The age here is not 70 or 60 but age 50. There is no broad spectrum of population making individualized testing impractical. Such testing already exists and the prognostic value of the examinations could not be questioned.

The issue in this case was not whether any particular age within a proper range was better than any other. All of the evidence showed that the mandatory retirement

age fell outside the range of fairness and rational relation to a state interest. The issue was whether the state could enforce the provisions of a mandatory retirement statute which incorporated a conclusive irrebuttable presumption that a fifty year old member was incapable of continuing in his job when the state's own medical testing proved the invalidity of the irrebuttable presumption. The district court correctly held that the state could not disregard its own determinations as to fitness and struck down the statute.

Conclusion

For the foregoing reasons the opinion of the district court should be affirmed.

Respectfully submitted,

ROBERT D. CITY, Esq.
THOMAS J. BUTTERS, Esq.
MOULTON, LOONEY & MAZZONE
15 Broad Street
Boston, Massachusetts 02109
(617) 742-5550
Attorneys for the Appellee

APPENDIX A

HOUSE . . . . . No. 2167

By Mr. Landry of Waltham, petition of Richard E. Landry relative to the retirement of certain employees in the Department of Public Safety. Public Service.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-Five.

AN ACT RELATIVE TO THE RETIREMENT OF CERTAIN EMPLOYEES IN THE DEPARTMENT OF PUBLIC SAFETY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Paragraph (a) of subdivision (3) of section 26 of chapter 32 of the General Laws, as most recently amended by chapter 321 of the acts of 1958, is hereby further amended by striking out the second sentence contained therein and inserting in place thereof the following: — Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty-five or upon the expiration of such twenty years, whichever last occurs.